No. 84-1379 (2)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

ALLAN G. CHARLES, M.D., et al.,

Appellees.

EUGENE F. DIAMOND, M.D., and
JASPER F. WILLIAMS, M.D.,

Appellants,

vs.

THE HOPE CLINIC FOR WOMEN, LTD., et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether the Illinois legislature's revision of a criminal abortion statute after entry of the District Court's judgment mooted intervening defendants' appeal from the District Court decision finding section 6(4) of the Illinois Abortion Law unconstitutional?

2. Whether the Illinois legislature's amendment of a criminal abortion statute after entry of the District Court's judgment mooted plaintiff-cross-appellants' appeal from the District Court's decision finding section 6(1) of the Illinois Abortion Law constitutional?

3. Can Illinois constitutionally subject physicians to criminal prosecution for failing, during pre-viability abortions, to use the abortion procedure which is least damaging to the fetus?

4. Can Illinois constitutionally subject a woman's attending physician and his assistants to criminal prosecution for failing to use the abortion procedure which is least damaging to a fetus "known to be viable," when the statute does not specify that the attending physician's determination of viability controls?

5. Whether the Illinois criminal abortion statute can constitutionally require physicians to inform all birth control patients for whom an abortifacient type of birth control is prescribed that they are prescribing abortifacients which cause fetal death?

PARTIES

The intervening defendants below, Eugene F. Diamond, M.D., and Jasper F. Williams, M.D., are appellants herein. Neil F. Hartigan, Illinois Attorney General, and Richard M. Daley, Cook County State's Attorney, were party-defendants to the proceeding in the Court of Appeals for the Seventh Circuit, but neither Hartigan nor Daley has appealed to this Court by filing a notice of appeal, or joined in the intervening defendants-appellants' Jurisdictional Statement.

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The unreported opinion of the District Court for the Northern District of Illinois referred to in intervening defendants-appellants' Jurisdictional Statement (p. 4), may be cited as *Charles v. Carey,* No. 79 C 4541 (N.D. Ill. November 16, 1979), and is reprinted in the Appendix of the Appellees.

IN THE

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OCTOBER TERM, 1984

EUGENE F. DIAMOND, M.D., and
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Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

The appellees, ALLAN G. CHARLES, M.D., MARVIN ROSNER, M.D., DAVID ZBARAZ, M.D., and MARTIN MOTEW, M.D., move the Court to dismiss the appeal or, in the alternative, affirm the judgment of the Court of Appeals, for the following reasons:

1. ORAL ARGUMENT OR FULL REVIEW OF THE JUDGMENT BELOW IS NOT JUSTIFIED BECAUSE THE CIRCUITS ARE NOT IN CONFLICT ON THE QUESTIONS PRESENTED BY APPELLANTS AND THERE IS NO PRESSING NEED TO REEVALUATE *ROE v. WADE*, 410 U.S. 113 (1973), AND ITS PROGENY IN LIGHT OF THIS COURT'S RECENT DECISIONS IN *CITY OF AKRON v. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC.*, 462 U.S. 416 (1983), *AND PLANNED PARENTHOOD ASS'N OF KANSAS CITY, INC. v. ASHCROFT*, 462 U.S. ___ (1983).

2. INTERVENING DEFENDANTS-APPELLANTS PRESENT NO SUBSTANTIAL FEDERAL QUESTIONS WHICH WOULD REQUIRE REVIEW BY THIS COURT.

3. THE JUDGMENT BELOW, FINDING UNCONSTITUTIONAL SECTIONS 6(1), 6(4), 2(10) AND 11(d) OF THE ILLINOIS ABORTION LAW OF 1975, IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND SHOULD BE AFFIRMED.

STATEMENT OF THE CASE

The Court should be aware of the following facts not presented in the intervening defendants-appellants' Statement of the Case:

The State of Illinois has a long history of enacting unconstitutional abortion laws.

Eleven provisions of the Illinois Abortion Law of 1975 were found unconstitutional in *Wynn v. Scott*, 449 F. Supp. 1302 (N.D. Ill. 1978) (three judge court), *aff'd sub nom., Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) ["*Wynn I*"].

The Illinois Abortion Parental Consent Act of 1977 was found unconstitutional in *Wynn v. Scott*, 448 F. Supp. 997 (N.D. Ill. 1978), *aff'd sub nom., Wynn v. Carey*, 582 F.2d 1375 (7th Cir. 1978) and *Wynn v. Carey*, 599 F.2d 193 (7th Cir. 1979) ["*Wynn II*"].

Fifteen provisions, or portions thereof, of Illinois Senate Bill 47, the 1979 amendments to the Illinois Abortion Law of 1975 (effective Oct. 30, 1979), including sections 6(1) and 6(4), were held unconstitutional by the District Court for the Northern District of Illinois and preliminarily enjoined on November 16, 1979. *Charles v. Carey*, No. 79 C 4541 (N.D. Ill. Nov. 16, 1979). On appeal, the Seventh Circuit enjoined two additional provisions, sections 2(10) and 11(d). *Charles v. Carey*, 627 F.2d 772 (7th Cir. 1980).

During the pendency of this litigation, the General Assembly enacted Illinois House Bill 666 (effective Sept. 17, 1983). HB 666 amended the statutory definition of viability and section 6(4) in the Illinois Abortion Law of 1975. The District Court, on cross-motions for summary judgment, held that even with the amendments, section 6(4) remained unconstitutional. Section 6(1) was found constitutional. *Charles v. Carey*, 579 F. Supp. 464 (N.D. Ill. 1983).

Illinois House Bill 1399, which further amended the Illinois Abortion Law of 1975, including sections 6(1) and 6(4), was enacted on June 30, 1984. Governor James Thompson vetoed this bill on constitutional grounds but the General Assembly overrode his veto. At the time HB 1399 was enacted, defendants' appeal from the District Court's decision enjoining sections 6(4), 2(10), and 11(d) had been fully briefed, although oral argument in the Court of Appeals had not been scheduled.*

A class of physicians immediately challenged HB 1399 and a temporary restraining order was entered on July 1, 1984, in *Keith v. Daley,* No. 84 C 5602 (N.D. Ill. July 1, 1984). That restraining order remains in effect.

The Seventh Circuit held that the amendments in HB 1399 did not moot the parties' appeals from the District Court's decision finding section 6(1) constitutional and section 6(4) unconstitutional. The court affirmed the District Court's decision finding sections 6(4), 2(10), and 11(d) unconstitutional, and reversed the District Court's decision finding section 6(1) constitutional. *Charles v. Daley,* 749 F.2d 452 (7th Cir. 1984).

Although required by Supreme Court Rule 15(g), the intervening defendants-appellants' Statement of the Case does not state that they raised the question of mootness (Appellants' Question Presented No. 2) for the first time during oral argument before the Seventh Circuit. Nor does their Statement reveal that at no stage of the proceedings below did they raise the claim that any state court or enforcement agency or any state official had ever proffered a limiting construction of section 6(1). Rather, they raise the "limiting construction" issue (Appellants' Question Presented No. 3) for the first time on appeal to this Court.

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* Plaintiffs cross-appealed the District Court's decision not to enjoin section 6(1).

REASONS WHY THE APPEAL SHOULD BE DISMISSED OR THE JUDGMENT BELOW AFFIRMED.

I. ORAL ARGUMENT OR FULL REVIEW OF THE JUDGMENT BELOW IS NOT JUSTIFIED BECAUSE THE CIRCUITS ARE NOT IN CONFLICT ON THE QUESTIONS PRESENTED BY THE INTERVENING DEFENDANTS-APPELLANTS AND THERE IS NO PRESSING NEED TO REEVALUATE *ROE v. WADE*, 401 U.S. 113(1973), AND ITS PROGENY IN LIGHT OF THIS COURT'S RECENT DECISIONS IN *CITY OF AKRON v. AKRON CENTER FOR REPRODUCTIVE HEALTH, INC.*, 462 U.S. 416 (1983), AND *PLANNED PARENTHOOD ASS'N OF KANSAS CITY, INC., v. ASHCROFT*, 462 U.S. ____ (1983).

In *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, ____, 103 S.Ct. 2481, 2487 (1983), this Court unequivocably reaffirmed *Roe v. Wade*, 410 U.S. 113 (1973), which held that a woman has a constitutional right to decide whether to terminate her pregnancy. *See also Planned Parenthood Ass'n of Kansas City, Inc. v. Ashcroft*, 462 U.S. ____, 103 S.Ct. 2517 (1983). Consequently, there is no pressing need to reevaluate *Roe v. Wade* and its progeny.

Moreover, the United States Courts of Appeals are not in conflict on the questions presented by the intervening defendants-appellants. Thus, one of the most traditional grounds for the exercise of Supreme Court jurisdiction, the resolution of conflicts among the circuits to assure uniformity of federal law, is not present.

II. INTERVENING DEFENDANTS-APPELLANTS PRESENT NO SUBSTANTIAL FEDERAL QUESTIONS WHICH WOULD REQUIRE REVIEW BY THIS COURT.

As discussed more fully *infra*, Part III, the questions presented by the intervening defendants-appellants have al-

ready been answered by this Court in earlier decisions regarding mootness, criminal regulation of pre-viability abortions, the attending physician's medical judgment, and a State's adoption of one theory of when life begins. Therefore, this appeal presents no substantial federal questions which require review by this Court.

III. THE JUDGMENT BELOW, FINDING UNCONSTITUTIONAL SECTIONS 6(1), 6(4), 2(10) AND 11(d) OF THE ILLINOIS ABORTION LAW, IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND SHOULD BE AFFIRMED.

A. A LIVE CASE OR CONTROVERSY CONTINUES THROUGHOUT THIS LITIGATION; THE AMENDMENT OF THE CHALLENGED STATUTE MERELY CONSTITUTES A VOLUNTARY, NON-BINDING, CESSATION OF IMPERMISSIBLE CONDUCT.

It is well established that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982) ("*Mesquite*"). Such an abandonment of challenged conduct is a "matter relating to the *exercise* rather than the existence of judicial power." *Id.* (Emphasis added.) Relying upon *Mesquite*, the Court of Appeals determined that intervening legislation did not moot the case pending before it. The Seventh Circuit's decision to exercise jurisdiction does not present an issue for review by this Court.

On June 30, 1984, after this case was briefed but before oral argument was heard by the Court of Appeals, the Illinois General Assembly enacted House Bill 1399 ("HB 1399"). This legislation was the fourth amendment to the Illinois Abortion Law of 1975, and included two of the sections challenged in the

pending appeal, section 6(1) and section 6(4). During oral argument, on September 19, 1984, intervening defendants-appellants argued for the first time that HB 1399 rendered moot the appeals of sections 6(1) and 6(4).[1] However, intervening defendants-appellants did not move to dismiss their appeal on section 6(4) or withdraw their arguments that section 6(4) and section 6(1) did not contravene the Constitution. At the suggestion of appellees' counsel, the Court of Appeals directed the parties to file supplemental briefs on mootness. After full briefing and consideration of this issue, the Court of Appeals held that HB 1399 did not moot the appeal of either section 6(1) or section 6(4). *Charles v. Daley*, 749 F.2d 452, 457-58 (7th Cir. 1984).

The defendant alleging mootness carries a heavy burden of persuasion. *See United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). Mootness results when, during the pendency of a lawsuit, events occur which make it impossible for a court to render a judgment affecting the rights of the litigants. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1976). When the supervening event is a voluntary cessation by defendant of the challenged conduct, the test for mootness is particularly stringent because without the compulsion provided by a binding judgment, "[t]he defendant is free to return to his old ways" and thus avoid an adjudication of the legality of his conduct. *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953); *see also United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968). In cases involving voluntary cessation of illegal conduct, mootness will be found only when "it can be said with assurance" that (1) no reasonable expectation exists that the violation will recur; *and* (2) the effects of the alleged violation have been

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[1] Sections 6(1) and 6(4), prior to amendment by HB 1399, are reproduced in the intervening defendants-appellants' Appendix at pp. 56-57 and 58, respectively. Sections 6(1) and 6(4), as they appear after amendment by HB 1399, are reproduced at 57-58 and 58-59, respectively.

completely and irrevocably eradicated. *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). *See also Mesquite*, 455 U.S. at 283 n.10. As recognized by the Court of Appeals, intervening defendants-appellants established neither criterion with respect to either section 6(4) or section 6(1).

1. The Appeal With Respect To Section 6(4) Is Not Moot.

a. The Latest Amendments To Section 6(4) Evidence A Continuing Violation Of The Constitution.

Intervening defendants-appellants cannot evade the first prong of the *Davis/Mesquite* test for mootness. The text of the amended section 6(4) retains the very standard held unconstitutional by both the Court of Appeals and the District Court. The repetition of that unconstitutional standard is overt evidence of a recurring violation of the Constitution and unequivocally demonstrates that it is unreasonable to expect that the violation will not recur. An historical review of the Illinois Abortion Law of 1975, as amended, demonstrates consistent attempts by the General Assembly to evade the dictates of *Roe v. Wade*, 410 U.S. 113 (1973), by enacting anti-abortion legislation and then superficially amending that legislation whenever it is subjected to constitutional attack.[2]

This Court has warned of a special need to "beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). That wariness is particularly appropriate with respect to section 6(4) of the Illinois Abortion Law which has been amended during the pendency of this litigation not only by House Bill 1399 in 1984, but also in 1983 by House Bill 666.

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[2] *See* cases cited in Statement of the Case, *supra*.

Each amendment was initiated only after an adverse ruling in the District Court.

It is both the timing and the nature of the amendments to section 6(4) that emphasize the parallel between the instant situation and that posed in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982). In *Mesquite*, the City of Mesquite, Texas ("City"), enacted a licensing ordinance regulating coin-operated amusement centers. The ordinance barred licensing an applicant who had any "connection with criminal elements." 455 U.S. at 287 & n.2. Aladdin's Castle, Inc. ("Aladdin") was denied a license because it was found to be "connected with criminal elements."

After a state court held that the term "connected with criminal elements" was unconstitutionally vague, the City enacted a new ordinance defining "connected with criminal elements." Again denied a license, Aladdin filed for injunctive relief in the United States District Court. The District Court held that the phrase "connected with criminal elements," even as defined, was unconstitutionally vague. 455 U.S. at 287 & n.2. The Court of Appeals for the Fifth Circuit affirmed. However, during that appeal the City had amended the ordinance by eliminating the objectionable phrase "connected with criminal elements." 455 U.S. at 287.

On further appeal, this Court rejected the City's contention that the amendment automatically made the case moot. If voluntary cessation of a challenged practice mooted a case, this Court observed, nothing would prevent a defendant from returning to the same unconstitutional practices. 455 U.S. at 288.

An identical risk of renewed recalcitrant conduct by defendants is present here. Relying on *Mesquite*, the Court of

Appeals rejected intervening defendants-appellants' argument that the appeal was moot, observing:

> Like the defendant City in [Mesquite], the State of Illinois could re-enact S.B. 47's version of section 6(4) if this court dismissed plaintiffs' challenge to that section. Indeed, the very number of amendments made to the challenged statute in the last several years persuades this court that such a result would not be unlikely.

Charles v. Daley, 749 F.2d at 458.[3] Thus, intervening defendants-appellants' failure to establish the first prong of the *Mesquite/Davis* standard is sufficient to defeat their mootness argument.

b. The Unconstitutional Effects Of The Old Section 6(4) Are Not Eradicated.

Intervening defendants-appellants also fail to comply with the second requirement of the *Mesquite/Davis* test. The newest amendments in HB 1399 neither correct the constitutional inadequacies of section 6(4) nor eradicate its harmful chilling effects. Both the Court of Appeals and the District Court held that the old section 6(4) was flawed because the State, by requiring physicians to act on behalf of fetuses displaying a "possibility of survival," unconstitutionally attempted to regulate the abortion process, on behalf of the fetus, prior to viability. By merely inserting the word "reasonable" before "possibility," the new section 6(4) continues to impose criminal liability on physicians who fail to act on behalf of a pre-viable fetus with only a "possibility of survival" outside the womb. Section 6(4) thus continues to contravene the prior holdings of this Court barring regulation of pre-viability abortions unless that regulation is narrowly structured to protect maternal

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[3] The Court of Appeals was intimately familiar with the number of amendments and consequent challenges to the Illinois Abortion Law of 1975. Since first being enacted, various amended versions of this law have been before the Court of Appeals at least four times. *See* Appellees' Statement of the Case, *supra.*

health. *See, e.g., Colautti v. Franklin,* 439 U.S. 379 (1979); *Planned Parenthood of Central Missouri v. Danforth,* 439 U.S. 52 (1976); *Roe v. Wade,* 410 U.S. 113 (1973).

Indeed, intervening defendants-appellants admit that a live case and controversy remains with respect to section 6(4). (Jurisdictional Statement at 43.) Intervening defendants-appellants argue that both the new and old section 6(4) constitutionally impose a pre-viability standard of care upon physicians. (Jurisdictional Statement at 43.) What intervening defendants-appellants fail to recognize is that the General Assembly's reenactment of the same "possibility of survival" standard that had been rejected by both the Court of Appeals and the District Court, is not only evidence of a recurring violation of the Constitution, but is also a clear failure to eradicate the harmful effects of the old statute. Thus, under *Mesquite,* HB 1399 did not moot this appeal. The Court of Appeals appropriately exercised its jurisdiction and decided the merits of the appeal.[4]

HB 1399 neither repealed the old section 6(4) nor corrected its constitutional flaws. Thus, if the new section 6(4),

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[4] It is axiomatic that a party remains master of his own case. However, despite their claim that HB 1399 rendered this case moot, intervening defendants never asked the Seventh Circuit to dismiss their appeal of section 6(4). Instead, intervening defendants continued to urge the Seventh Circuit to reverse the District Court's injunction of that section. Intervening defendants' continued advocacy is significant. In *Walling v. Helmerick & Payne, Inc.,* 323 U.S. 37, 43 (1944), the Court declined to treat as moot an action under the Fair Labor Standards Act even after the defendant employer voluntarily had changed its method of paying employees. This Court observed that defendant "has consistently urged the validity of the [old] plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made." As recognized by the Court of Appeals, defendants here would have the same freedom to resume their old ways absent a binding judicial decision.

currently under restraining order, is permanently enjoined, the old section 6(4) is once again available to law enforcement officials. Because the statute of limitations for Class 3 felonies has not run, Ill.Rev.Stat. 1983, Ch. 38 ¶ 3-5(b), plaintiff-physicians would be subject to a risk of prosecution under the old standard. Thus, HB 1399 did not eliminate the harmful effects of the old section 6(4).

Intervening defendants-appellants concede that the amended section 6(4) adopts a pre-viability standard almost identical to that struck down by the Court of Appeals and the District Court. This concession emphasizes not only the intervening defendants-appellants' failure to satisfy either prong of the *Mesquite/Davis* test, but also the continuing live controversy with respect to section 6(4). The Court of Appeals' exercise of jurisdiction with respect to section 6(4) does not present a substantial federal question deserving of review by this Court.

2. Section 6(1) Presents A Live Case Or Controversy.

a. Plaintiff-Physicians Remain At Risk Under The Old Section 6(1).

Section 6(1), no less than section 6(4), has been subject to continuous amendment by the General Assembly in response to successful constitutional challenges. Intervening defendants-appellants thus cannot satisfy the first prong of the *Mesquite/Davis* test. However, the live nature of the constitutional controversy surrounding section 6(1) provides an additional and more compelling reason for the Court of Appeals to reach the merits. HB 1399 did not repeal old section 6(1). Old section 6(1) poses continuing consequences—the risk of prosecution—even after its amendment. These consesquences rebut intervening defendants-appellants' contention that HB 1399 rendered moot plaintiff-physicians' appeal before the Seventh Circuit.

Old section 6(1) remained in effect from October 14, 1983, until June 30, 1984, the day HB 1399 was enacted. Violation of the old section 6(1) was a Class 2 felony if the death of a fetus occurred as a result of a post-viability abortion. Ill.Rev.Stat. 1983, Ch. 38, ¶ 81-26(1). The relevant statute of limitations, Ill.Rev.Stat. 1983, Ch. 38, ¶ 3-5(b), allows the State a period of three years within which to commence prosecution. As noted by the Court of Appeals, this risk of prosecution was "insufficiently speculative" to render moot the appeal on section 6(1). *Charles v. Daley,* 749 F.2d at 457.

B. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT CORRECTLY FOUND THAT SECTION 6(1) OF THE ILLINOIS ABORTION LAW IS UNCONSTITUTIONALLY VAGUE AND ENCROACHES UPON THE ATTENDING PHYSICIAN'S MEDICAL JUDGMENT.

The Court of Appeals for the Seventh Circuit, following Supreme Court precedent in *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416 (1983); *Planned Parenthood of Central Missouri, v. Danforth,* 428 U.S. 52 (1976); *Colautti v. Franklin,* 439 U.S. 379 (1979); and *Franklin v. Fitzpatrick,* 428 U.S. 901 (1976), correctly found section 6(1) unconstitutional.

Section 6(1) of the Illinois Abortion Law of 1975, as amended by SB 47, provides:

> No person who intentionally terminates a pregnancy after the fetus is known to be viable shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in such a pregnancy termination who shall intentionally fail to take such measures to encourage or to sustain the life of a fetus known to be viable, before or after birth, commits a Class 2 felony if the death of a viable fetus or infant results from such failure.

The Court of Appeals noted that while section 6(1) applies when the fetus is "known to be viable," it does not specify who is to make the viability determination. The consequence of this vagueness, stated the Court of Appeals, is that:

> the section could make criminal an assistant's failure to use the requisite care in aborting a fetus which the assistant, but not the physician, believes in [sic] nonviable. In addition, the section could make criminal a physician's failure to observe the required standard of care in situations where some other physician, but not the treating physician, believes that the fetus is viable.

Charles v. Daley, 749 F.2d at 459.

This Court has held that "the determination of whether a particular fetus is viable is, and must be, a matter for the responsible attending physician," *Planned Parenthood of Central Missouri, v. Danforth,* 428 U.S. at 64, and that the State may not interfere with the attending physician's medical judgment in determining viability. *Colautti v. Franklin,* 439 U.S. at 395-96. Relying on those decisions, the Court of Appeals held that "[b]ecause section 6(1) does not specify that the attending physician's viability determination alone shall govern, section 6(1) improperly encroaches on the attending physician's medical judgment in treating his patient." 749 F.2d at 459.

The intervening defendants-appellants concede that "the determination of viability [must be] left to 'the attending physician on the particular facts of the case before him,' " *citing Colautti v. Franklin,* 439 U.S. 379, 388 (1979), and admit that "[s]ection 6(1) did not conclusively specify that the attending physician's determination of viability controls." (Jurisdictional Statement at 47.) Nevertheless, intervening defendants-appellants argue that the Court of Appeals erred in failing to construe section 6(1) as applying only when the fetus is "known [by the attending physician] to be viable." This is the only argument made by intervening defendants-appellants with regard to section 6(1).

In support of their argument, intervening defendants-appellants cite *Kolender v. Lawson,* 461 U.S. 352, 355 (1983), for the proposition that "[i]n evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a *state court* or *enforcement agency* has proffered." (Jurisdictional Statement at 46.) (Emphasis added.) The *Kolender* case involved a California criminal statute that required persons who loiter or wander on the streets to provide "credible and reliable identification" and to account for their presence when requested by a peace officer. The California Court of Appeal, nine years earlier, had construed the term "credible and reliable identification" to mean "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." 461 U.S. at 358-59. Citing *Colautti,* 439 U.S. at 394-401, this Court noted that when a statute imposes criminal penalties, it must be drafted with more clarity and precision than a non-criminal statute. Applying a heightened standard of scrutiny, this Court held that the statute, on its face and as construed by the California Court of Appeal, was unconstitutionally vague because it contained no standard for determining what a suspect has to do in order to satisfy the requirement to provide "credible and reliable identification." 461 U.S. at 358-59.

In this case, no limiting construction has been proffered by a state court or enforcement agency. Indeed, the Attorney General, who is charged with defending the statute's constitutionality, and the State's Attorney, who is charged with enforcing the statute, have not appealed from the Seventh Circuit's decision finding these sections of the Illinois Abortion Law unconstitutional. Intervening defendants-appellants apparently base their "limiting construction" argument on the fact that Hartigan and Daley adopted intervening defendants' Seventh Circuit reply brief, which contains intervening defendants' own argument that section 6(1) should be construed to

avoid unconstitutionality. (Jurisdictional Statement at 48.) However, that reply brief does not contain any reference to an authoritative construction offered by either Hartigan or Daley. Thus, the Court of Appeals clearly cannot be faulted for failing to consider a "limiting construction" never presented to the Court.

Intervening defendants-appellants ignore two other substantial reasons given by the Court of Appeals for finding section 6(1) unconstitutional.

The Court of Appeals stated that the State "must precisely tailor its standard of care [in section 6(1)] to the particular State interests at stake so that its statute precisely notifies physicians and their assistants as to what conduct by them the State purports to condemn." *Charles v. Daley,* 749 F.2d at 460. When confronted with a similarly ambiguous standard of care requirement in *Colautti v. Franklin,* 439 U.S. 379 (1979), this Court held that "where conflicting duties [to the patient and to the fetus] of this magnitude are involved, the State, at the least, must proceed with greater precision before it may subject a physician to possible criminal sanctions." *Id.* at 400-01. Relying on this Court's decision in *Colautti,* the Court of Appeals properly concluded that "the State must proceed with greater precision before it may subject a physician, or his assistant, to criminal sanction [under section 6(1)]." *Charles v. Daley,* 749 F.2d at 460.

The third reason given by the Court of Appeals for finding section 6(1) unconstitutional is that it unconstitutionally burdens the exercise of a woman's fundamental right to abortion by placing obstacles in the form of criminal sanctions in the path of the physician upon whom she is entitled to rely for advice. The Court of Appeals noted that "[w]here a vague statute 'abuts upon' the exercise of fundamental rights, the statute 'operates to inhibit the exercise of freedoms,'" *citing*

Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 571 (E.D. Pa. 1975), *aff'd sub nom. Franklin v. Fitzpatrick,* 428 U.S. 901 (1976). *Charles v. Daley,* 749 F.2d at 460.

Section 6(1) is unconstitutionally vague because it threatens criminal prosecutions against physicians and their assistants without precisely delineating the prohibited conduct. Thus, the Court of Appeals reasoned, section 6(1) unconstitutionally "chill[s] the exercise of a physician's best medical judgment in consulting with his patients about abortion." *Id.* That chill on the exercise of the physician's best medical judgment "abuts upon a woman's fundamental right to consult her doctor about abortion and to receive her doctor's unimpeded medical judgment, [and] threatens to chill the exercise of her freedom." *Id.*

In *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, ____, 103 S.Ct. 2481, 2491 (1983), this Court reiterated that "the full vindication of the woman's fundamental right necessarily requires that her physician be given 'the room he needs to make his best medical judgment,' " *citing Doe v. Bolton,* 410 U.S. 179, 192 (1973), and *Whalen v. Roe,* 429 U.S. 589, 604-05 n.33 (1977). Thus, the judgment of the Court of Appeals that section 6(1) unconstitutionally inhibits the exercise of a woman's fundamental right to abortion is consistent with the decisions of this Court.

For all of the above reasons, the judgment of the Court of Appeals as to section 6(1) should be affirmed.

C. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT WAS CORRECT IN FINDING THAT SECTION 6(4) OF THE ILLINOIS ABORTION LAW IS NOT SUPPORTED BY A COMPELLING STATE INTEREST IN FETAL LIFE OR MATERNAL HEALTH AND IS THEREFORE UNCONSTITUTIONAL.

Like section 6(1), section 6(4) imposes a standard of care upon physicians and their assistants who perform abortions,

and enforces that standard of care with the threat of felony criminal prosecution. Unlike section 6(1), however, section 6(4) regulates the abortion of the pre-viable fetus.

Section 6(4) of the Illinois Abortion Law of 1975, as amended by SB 47 and HB 666, provides:

> No person who intentionally terminates a pregnancy shall intentionally fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted when there exists, in the medical judgment of the physician performing the pregnancy termination based on the particular facts of the case before him, a possibility known to him of sustained survival of the fetus apart from the body of the mother, with or without artificial support. Any physician or person assisting in such pregnancy termination who shall intentionally fail to take such measures to encourage or sustain the life of such a fetus, before or after birth, is guilty of a Class 3 felony if the death of a viable fetus or an infant results from such a failure.

This Court has stated clearly that prior to viability, "a State . . . may not impose direct obstacles — such as criminal penalties — to further its interest in the potential life of the fetus." *Colautti v. Franklin,* 439 U.S. 379, 386-87 n. 7 (1979). *Cf. Planned Parenthood of Central Missouri, v. Danforth,* 428 U.S. 52, 81-84 (1976). Intervening defendants-appellants admit that section 6(4) "operates prior to 'legal' viability; a stage in pregnancy when the State's interest in protecting legal life has not yet become compelling." (Jurisdictional Statement at 52.)

The Court of Appeals followed the *Colautti* decision and found section 6(4) unconstitutional. The Court of Appeals recognized that doctors' refusal to perform certain previability abortions, because of the risk of criminal sanctions under section 6(4), "significantly burden[ed] a woman's right to terminate her pregnancy." *Charles v. Daley,* 749 F.2d at 461.

The State may justify a restriction of the right to abortion if it has a compelling interest in preserving fetal life, *Roe v. Wade,* 410 U.S. 113, 163 (1973), or in protecting maternal health, *Akron,* 462 U.S. at ____, 103 S.Ct. at 2492. Neither of the above interests justifies section 6(4). First, the Court of Appeals found that section 6(4) does not seek to protect the health of the mother and intervening defendants-appellants do not argue otherwise. *Charles v. Daley,* 749 F.2d at 461. As for the second possible justification, the Court of Appeals stated:

> [T]he State's interest in preserving fetal life, becomes compelling only at the stage of viability. *Roe v. Wade,* 410 U.S. at 163, 93 S.Ct. at 731. As a consequence, the State's interest in preserving fetal life cannot justify section 6(4) because section 6(4) applies to certain pre-viability abortions. . . . Because the State has advanced no other compelling interest which could justify section 6(4)'s restriction on a woman's freedom to choose an abortion, this court must find that section 6(4) unconstitutionally infringes on the woman's fundamental right. Section 6(4) is therefore invalid.

Id. The Court of Appeals' analysis is correct and consistent with this Court's *Colautti* decision.

Intervening defendants-appellants' argument that "the requirements of [section] 6(4) neither coerce nor significantly encourage any physician to refuse to perform abortions [on pre-viable fetuses]" ignores both the lack of a compelling state interest in fetal life prior to viability and section 6(4)'s criminal penalties. Intervening defendants-appellants simply, and without justification, invite this Court to overrule its decisions in *Akron, Colautti, Danforth,* and *Roe v. Wade.*

For the reasons stated, the judgment of the Court of Appeals as to section 6(4) should be affirmed.

D. THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT WAS CORRECT IN FINDING THAT SECTIONS 2(10) AND 11(d) OF THE ILLINOIS ABORTION LAW UNCONSTITUTIONALLY INTRUDE ON THE MEDICAL DISCRETION OF THE ATTENDING PHYSICIAN AND FORCE THE PHYSICIAN TO FOIST UPON THE PATIENT THE STATE'S VIEW THAT LIFE BEGINS AT CONCEPTION.

Contrary to the assertion of intervening defendants-appellants (Jurisdictional Statement at 14), the judgment of the Court of Appeals as to sections 2(10) and 11(d) is *not* "in direct conflict with the decisions of this Court in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 67 (1976), and *City of Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, ____, 103 S.Ct. 2481, 2502 (1983)." Rather, the decision below is in perfect harmony with those decisions and must be affirmed.

Sections 2(10) and 11(d) of the Illinois Abortion Law of 1975, as amended by SB 47, provide:

> 2(10) "Abortifacient" means any instrument, medicine, drug or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed.
>
> 11(d) Any person who sells any drug, medicine, instrument or other substance which he knows to be an abortifacient and which is in fact an abortifacient, unless upon prescription of a physician, is guilty of a Class B misdemeanor. Any person who prescribes or administers any instrument, medicine, drug or other substance or device, which he knows to be an abortifacient, and which is in fact an abortifacient, and intentionally, knowingly or recklessly fails to inform the person for whom it is prescribed or upon whom it is administered that it is an abortifacient commits a Class C misdemeanor.

"Fetus" is defined to mean "a human being from fertilization until birth," and "human being" is defined to mean "the individual from fertilization until death." Ill. Rev. Stat. 1983, Ch. 38 ¶ 81-22(8) and ¶ 81-22(9) (Sections 2(8) and 2(9) of the Illinois Abortion Law of 1975).

The Court of Appeals noted that in *Danforth,* this Court upheld a general requirement that physicians obtain informed consent before a woman undergoes an abortion by informing patients as to "what will be done and as to its consequences." 428 U.S. at 67 n.8. In *Danforth,* this Court "cautioned . . . that a more detailed requirement of informed consent could confine the attending doctor in an undesired and uncomfortable straitjacket in the practice of his profession." *Charles v. Daley,* 749 F.2d at 461. The effect of sections 2(10) and 11(d) is to put physicians in just such a "straitjacket."

In *Akron,* this Court analyzed an "informed consent" abortion statute that required the attending physician to provide an inflexible list of specific information "to each woman regardless of whether in his judgment the information is relevant to her personal decision," including information that "the unborn child is a human life from the moment of conception." 462 U.S. at ____, 103 S.Ct. at 2499-2501. The Court stated that "[i]t remains primarily the responsibility of the physician to ensure that appropriate information is conveyed to his patient, *depending on her particular circumstances*" (emphasis added), and struck down that section of the statute because it went "far beyond merely describing the general subject matter relevant to informed consent." 462 U.S. at ____, 103 S.Ct. at 2500-01.

A second section of the "informed consent" statute required the attending physician to inform the woman "of the particular risks associated with her own pregnancy and the abortion technique to be employed . . . [and] other information *which in his own medical judgment is relevant to her decision* as

to whether to have an abortion or carry her preganancy to term." (Emphasis added.) *Id.* at 2501.

Relying on this Court's decisions in *Danforth* and *Akron*, the Court of Appeals held that section 11(d) intrudes on the medical discretion of the attending physician. *Charles v. Daley*, 749 F.2d at 462. Section 11(d) defines the *precise nature* of the information, *Akron*, 462 U.S. at ____, 103 S.Ct. at 2499, and inflexibly requires that the physician must notify *each woman* that he has prescribed or administered an "abortifacient," "regardless of whether in his judgment the information is relevant to her personal decision." *Akron*, 462 U.S. at ____, 103 S.Ct. at 2499. In the absence of this inflexible requirement, nothing prevents a physician from identifying those forms of birth control which prevent implantation of a fertilized egg for women who object to such forms of birth control on religious or other grounds.

In addition, the Court of Appeals found that the precise nature of the information which section 11(d) requires physicians to provide "impermissibly imposes the State's theory of when life begins upon the physician's patient." *Charles v. Daley*, 749 F.2d at 462. The Court of Appeals reiterated that "the use of the term 'abortifacient' in describing certain birth control methods forces the physician to act as the mouthpiece for the State's theory of life." *Charles v. Daley*, 749 F.2d at 462, *citing Charles v. Carey*, 627 F.2d 789 (7th Cir. 1980). Sections 2(10) and 11(d) incorporate a definition of "fetus" in which the State classifies a "fetus" as synonymous with "unborn child", "each mean[ing] a human being from fertilization until birth." The Court of Appeals properly followed this Court's ruling in *Akron*, 462 U.S. at ____, 103 S.Ct. at 2500, that requiring a physician to inform his patient that "the unborn child is a human life from the moment of conception" is "inconsistent with the Court's holding in *Roe v. Wade* that a State may not adopt one theory of when life begins to justify its regulation of abortions." *Charles v. Daley*, 749 F.2d at 462.

Furthermore, "[t]hese sections additionally infringe upon a woman's constitutionally protected right of private decision-making in matters relating to contraception, with no countervailing State compelling interest. *See Carey v. Population Services International,* 431 U.S. at 688-89, 97 S.Ct. at 2017-18." *Charles v. Daley,* 749 F.2d at 462.

Intervening defendants-appellants assert that "[n]othing in § 11(d) requires the physician to describe an abortifacient in any particular manner. He may use whatever language he chooses in describing it." (Jurisdictional Statement at 13-14.) "[Section 11(d)] does [not] in any way require a physician to explain an 'abortifacient' to his patient in the manner set forth in § 2(10)." (*Id.* at 16 n.3.) In reading section 11(d) to incorporate the definition of "abortifacient" provided by the same statute, intervening defendants-appellants argue, "the court disregarded well-settled principles of statutory construction . . .."[5] (Jurisdictional Statement at 20.) At the same time, however, intervening defendants-appellants *rely* on the definition of "abortifacient" in section 2(10) to save section 11(d) from vagueness, "so that . . . doctors will know under what circumstances § 11(d) applies." (Jurisdictional Statement at p. 14 n. 2.) Intervening defendants-appellants also attempt to rely on the definition of "fetus," as amended by HB 1399, to support their argument that sections 2(10) and 11(d) are

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[5] Intervening defendants-appellants have not stated or cited the principles to which they refer, making response to this assertion impossible. Intervening defendants-appellants also assert that the Court of Appeals erred in construing section 11(d) "contrary to the limiting construction of the *agencies* charged with enforcement . . .." (Emphasis added.) Intervening defendants-appellants state in a footnote that "Appellants Daley and Hartigan . . . have repeatedly stated that doctors must only inform the women that they are administering or prescribing an abortifacient and nothing more." (Jurisdictional Statement at 26 and n.8.) Intervening defendants-appellants can cite nothing in the record to support their allegation that Daley and Hartigan ever made such statements.

constitutional. (Jurisdictional Statement at 20-21 n.5.) Clearly, intervening defendants-appellants cannot have it both ways.

The Court of Appeals logically and correctly read section 11(d) in light of the relevant definitions provided in the statute at the time of the District Court's decision. There is no way to logically or reasonably construe section 11(d), in light of sections 2(8), 2(9), and 2(10), as *not* requiring physicians to inform *all* patients, regardless of individual circumstances, that certain methods of birth control "cause" the "death" of an "unborn child" or "human being." Intervening defendants-appellants admit that the term "human" or "human being" [when used in reference to a fertilized egg or fetus] "may have . . . connotations of personhood or membership in society which may be offensive to some . . .." (Jurisdictional Statement at 21.) In effect, intervening defendants-appellants admit that the State is foisting a view of when life begins on persons who do not share the State's view.

Despite intervening defendants-appellants' denial, the State in sections 2(10) and 11(d) is improperly attempting to influence women's constitutionally protected right of private decision-making in matters relating to birth control by requiring physicians to inform all women that certain methods of birth control cause the death of an unborn child or human being. If a gynecologist in Illinois fails to inform his patient that the IUD she has requested will cause the death of an unborn child or human being, he could go to prison under the penalties imposed by sections 2(10) and 11(d). None of the cases cited or arguments made by intervening defendants-appellants support this ridiculous result.

For all of the above reasons, the judgment of the Court of Appeals as to sections 2(10) and 11(d) should be affirmed.

CONCLUSION

This appeal should be dismissed because the intervening defendants-appellants present no substantial questions which require review by this Court. Alternatively, the judgment below should be summarily affirmed because the decision finding sections 6(1), 6(4), 2(10) and 11(d) of the Illinois Abortion Law of 1975 unconstitutional is consistent with the decisions of this Court.

Respectfully submitted,

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Dated: April 1, 1985

APPENDIX

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

ALLAN G. CHARLES, M.D., MARVIN ROSNER, M.D., DAVID ZBARAZ, M.D., and MARTIN MOTEW, M.D., and on behalf of all other similarly situated,
Plaintiffs,

v.

BERNARD CAREY, State's Attorney for the County of Cook, WILLIAM J. SCOTT, Attorney General of the State of Illinois, their agents successors, and all others similarly situated, and BYRON FRANCIS, M.D., Acting Director of Public Health, State of Illinois,
Defendants.

79 C 4541

THE HOPE CLINIC FOR WOMEN, LTD., an Illinois corporation, HECTOR N. ZEVALLOS, M.D., NATIONAL HEALTH CARE SERVICES OF PEORIA, INC., an Illinois corporation, ARTHUR C. WATSON, JR., M.D., and ROBERT C. STEPTOE, M.D.,
Plaintiffs,

v.

WILLIAM J. SCOTT, Attorney General of the State of Illinois, and BERNARD CAREY, State's Attorney of Cook County Illinois,
Defendants.

79 C 4548

MEMORANDUM OPINION

JOEL M. FLAUM, District Judge

This consolidated[1] class action is brought by seven physicians who are engaged in the practice of obstetrics and gynecology and by two Illinois corporations which perform abortion services for women against the Attorney General of the State of Illinois, the State's Attorney of Cook County, Illinois, who is sued in his official capacity and as the representative of a class of all other State's Attorneys in Illinois, and the Acting Director of the Department of Public Health of the State of Illinois.[2] In addition two physicians, one who is engaged in the practice of pediatrics and is the parent of a minor daughter of childbearing age and one who is engaged in the practice of obstetrics and gynecology, and the spouse of a woman of childbearing age have sought and obtained leave to intervene as defendants. This action challenges the constitutionality of the Illinois Abortion Law of 1975, as amended October 30, 1979 (the "1979 Law"), and seeks declaratory and injunctive relief. Plaintiffs allege deprivations of rights secured under the first, fourth, fifth, ninth and fourteenth amendments to the United States Constitution and 42 U.S.C. § 1983 and jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1343, 2201 and 2202. On October 31, 1979 this court entered an order temporarily restraining the implementation and enforcement of the 1979 Law and on November 8, 1979 this court extended the temporary restraining order until November 16, 1979 pending ruling on plaintiffs' motion for a preliminary injunction.[3] For the reasons set forth below, plaintiffs' motion is granted in part and denied in part.

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[1] Two related cases, No. 79 C 4541 and No. 79 C 4548, have been consolidated for the purposes of the motions presently pending before the court. Unless otherwise stated, the issues and the parties are the same in each case.

[2] Defendant, Dr. Byron Francis, the Acting Director of the Illinois Department of Public Health, is named as a defendant only in No. 79 C 4541.

[3] Defendant Bernard Carey, State's Attorney of Cook County, Illinois, has moved for summary judgment and defendants William J. Scott, Attorney General of the State of Illinois and Dr. Byron Francis, the Acting Director of the Illinois Department of Public Health, have moved to dismiss. These pending motions are not ruled on by the court at this time.

Since defendants[4] have raised numerous standing arguments,[5] it is necessary to describe in additional detail who some of the plaintiffs in this action are. Dr. Allan J. Charles, Dr. David Zbaraz and Dr. Martin Motew share their practice with two other obstetricians/gynecologists. Their practice is approximately fifty percent obstetrics, of which approximately three percent or a minimum of three patients per week are pregnancy terminations. Dr. Charles has researched and published numerous articles in the fields of obstetrics and gynecology, including articles on amniocentesis, and Dr. Motew has conducted research in perinatal medicine, including published papers on premature labor, fetal monitoring and ultrasonography. Dr. Hector N. Zevallos and Dr. Robert C. Steptoe have also published numerous articles in the fields of obstetrics and gynecology. The Hope Clinic for Women, Ltd., presently performs approximately 440 abortions per month, of which approximately twenty percent are for patients under eighteen years of age and eighteen percent are for married women, and the National Health Care Services of Peoria, Inc., presently performs approximately 375 abortions per month, of which approximately thirty-seven percent are for patients under eighteen years of age and thirty-five are for married women.

In most cases, two elements must be satisfied in order to have standing to litigate a particular issue: (1) the plaintiff must allege that he has a personal stake in the outcome of the litigation and will suffer some threatened or actual injury if the statute is enforced; and (2) the plaintiff must assert his own legal rights and interests. *Warth v. Seldin*, 422 U.S. 490, 498-99

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[4] As noted above, the named defendants have moved either to dismiss or for summary judgment and have not filed memoranda in opposition to plaintiffs' motion for a preliminary injunction. Therefore, any arguments advanced against the issuance of a preliminary injunction are those of the intervenors.

[5] Defendants' preliminary claim that a conflict of interest exists between women and physicians and abortion clinics is insubstantial. *Wynn v. Scott*, 449 F. Supp. 1302, 1305 n.1 (N.D. Ill. 1978).

(1975). However, with respect to the second element, in abortion cases, physicians may assert the legal rights of their pregnant patients if the physicians themselves are threatened with actual injury, such as the risk of criminal prosecution if they do not comply with the statutory requirements. *Doe v. Bolton,* 410 U.S. 179, 188 (1973).

Defendants contend that plaintiffs do not have standing to challenge sections 1, 3.1(A), 3.1(B), 3.2, 3.5, 6(2), 6(3), 6(7), 8, 11(c) and 13 of the 1979 Law. Plaintiffs have standing to challenge sections 3.1(A) (the medical judgment provision, the intentional and knowing violation of which by a physician is a Class 2 felony), 3.1(B) (the medical consultation provision, the intentional and knowing violation of which by a physician is a Class 2 felony), 3.1(B) (the medical consultation provision, the intentional, knowing or reckless violation of which by a physician is a Class A misdemeanor), 3.2 (the informed consent provision, the intentional, knowing, or reckless violation of which by a physician is a Class B misdemeanor), 3.5 (the printed information provision which is referred to in sections 3.2, 3.3, and 3.4, the intentional, knowing or reckless failure to conform to any requirement of which is a Class B misdemeanor), and 6(3) (the ban on fetal research provision, the violation of which is a Class 1 felony) because they impose obligations on plaintiffs directly and affect their own legal interests.

No plaintiff has standing to challenge section 6(2) which provides that the "law of this State shall not be construed to imply that any human being aborted alive is not an individual under the 'Criminal Code of 1961,' approved July 28, 1961, as amended". Inasmuch as this section places no obligation upon plaintiffs or their pregnant patients, plaintiffs lack standing to challenge this section.

The same is true with respect to section 6(7) which provides that any

> "person who intentionally causes the fertilization of a human ovum by a human sperm outside the body of a living human female shall, with regard to the human being thereby produced, be deemed to have the care and custody of a child for the purposes of Section 4 of the Act to Prevent and Punish Wrongs to Children, approved May 17, 1877, as amended, except that nothing in that Section shall be construed to attach any penalty to participation in the performance of a lawful pregnancy termination."

No plaintiff has alleged that he is engaged in *in vitro* fertilization or has patients interested in *in vitro* fertilization. Therefore, no plaintiff has standing to challenge section 6(7).

Additionally, no plaintiff has standing to challenge section 8 which states:

> Upon a finding by the Juvenile Court that a live born infant has resulted from a voluntary abortion, such an infant has been abandoned pursuant to the procedures and provisions of the "Juvenile Court Act", approved August 5, 1965, as amended, and "An Act in relation to the adoption of persons, and to repeal an Act therein named", approved July 17, 1959, as amended. Such an infant, prior and subsequent to birth, is a minor and a child pursuant to the procedures and provisions of said Acts."

Plaintiffs have failed to allege that they or their pregnant patients would be injured in fact by this section. Therefore, they lack standing to challenge section 8 also.[6]

Moreover, plaintiffs do not have standing to challenge section 11(c) which provides that:

> Any person, firm, corporation, association, agency, institution, or other legal entity which solicits, offers or receives any kickbacks or bribes in connection with the

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[6] Plaintiffs also lack standing to challenge part of section 7. This will be discussed later in the opinion.

> performance of an abortion or which solicits, offers or receives a rebate or a fee for referring an individual to another person for the providing of an abortion commits a Class A misdemeanor.

None of the plaintiffs have alleged that they have engaged in any conduct or propose to engage in any conduct which they fear could violate this section. Therefore, plaintiffs lack standing to challenge section 11(c).

Finally, no plaintiff has standing to challenge section 13, which provides:

> No physician, hospital, ambulatory surgical center, nor employee thereof, shall be required against his or its conscience declared in writing to perform, permit or participate in any abortion, and the failure or refusal to do so shall not be the basis for any civil, criminal, administrative or disciplinary action, proceeding, penalty or punishment. If any request for an abortion is denied, the patient shall be promptly notified.

This section, which is unchanged from the Illinois Abortion Act of 1975 (the "1975 Act"), was challenged in *Wynn v. Scott,* 449 F. Supp. 1302 (N.D. Ill. 1978). In *Wynn* Judge Marshall, speaking for a three-judge district court, held that since no plaintiff had alleged that a physician or hospital had invoked or threatened to invoke this clause to prevent obtaining or performing an abortion, no plaintiff had standing to challenge section 13. 449 F. Supp. at 1309. This court finds no reason to disagree with Judge Marshall's conclusion.

Defendants also contend that plaintiffs have no standing to challenge the constitutionality of section 1 of the 1979 Law. Section 1 is not a substantive provision because it does not contain any requirements or sanctions. Therefore, it is unnecessary to determine whether plaintiffs have standing and whether section 1 is unconstitutional. *Wynn v. Scott,* 449 F. Supp. 1302, 1308 (N.D. Ill. 1978). *Accord, Wynn v. Scott,* 448 F. Supp.

997, 1006 (N.D. Ill. 1978), *aff'd sub nom. Wynn v. Carey,* 582 F.2d 1375 (7th Cir. 1978).

Initially plaintiffs argue that the 1979 Law is invalid in its entirety because it asserts an impermissible purpose in violation of the establishment of religion clause of the first amendment and the equal protection clause of the fourteenth amendment. The court cannot so conclude.

The Supreme Court has established a three-part inquiry in order to determine the constitutionality of legislation alleged to violate the establishment clause. *Committee for Public Education & Religious Liberty v. Nyquist,* 413 U.S. 756, 773 (1973). The 1979 Law satisfies all three parts of this inquiry: (1) it reflects a clearly secular legislative purpose, *Epperson v. Arkansas,* 393 U.S. 97 (1968); (2) it has a primary effect that neither advances nor inhibits religion, *School District of Abington Township, Pa. v. Schempp,* 374 U.S. 203 (1963); and (3) it avoids excessive government entanglement with religion, *Walz v. Tax Commission of City of N.Y.,* 397 U.S. 664 (1970).

If legislation operates to the disadvantage of a suspect class, *e.g.,* race or alienage, or impinges upon a fundamental interest explicitly or implicitly protected by the Constitution, *e.g.,* voting or privacy (procreation, marriage and related matters), it is subject to strict judicial scrutiny under the equal protection clause. If not, the legislation must be examined to determine whether it rationally furthers some legitimate, articulated state purpose. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 17 (1973). Under strict judicial scrutiny, legislation must be necessary for the achievement of a compelling state interest. While the 1979 Law does not operate to the disadvantage of some suspect class[7] and it does not, in its

[7] Classifications which impose possible criminal penalties on doctors who perform abortions while ignoring doctors who do obstetrical care or other medical procedures and which burden women who seek abortions while ignoring similarly situated women who seek prenatal care or other medical procedures are not suspect.

entirety, impinge upon a woman's fundamental privacy right to choose abortion,[8] it rationally furthers the state's legitimate interests.

Thus, the 1979 Law is not invalid in its entirety. Alternatively, plaintiffs argue that several, but not all, sections of the 1979 Law are unconstitutional. The court will address those challenges which are critical at this juncture of the litigation.[9]

Plaintiffs contend that the definition of viability contained in section 2(2) of the 1979 Law is unconstitutional under *Roe v. Wade,* 410 U.S. 113 (1973), *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52 (1976), and *Colautti v. Franklin,* 99 S. Ct. 675 (1979). Defendants, on the other hand, contend that the 1979 Law alters the definition of viability to conform to *Colautti.* Since several other sections of the 1979 Law incorporate the words "viable" or "viability"[10] and since the state may not impose criminal penalties to further its interest in the potential life of the fetus prior to viability, *Colautti,* 99 S. Ct. at 681 n.7, the constitutionality of this definition is critical.

Viability is defined in section 2(2) as

"that stage of fetal development when, in the medical judgment of the attending physician based on the particu-

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[8] To the extent that a particular section of the 1979 Law, if any, may impinge upon a woman's fundamental privacy right, it will be addressed later in the opinion.

[9] Plaintiffs argue that the amendment to section 2(1) is unconstitutional because it arbitrarily reduces the period of the first trimester by approximately three days by beginning with ovulation rather than conception. Section 2(1) defines "first trimester" as the "first twelve weeks of gestation commencing with ovulation rather than computed on the basis of the menstrual cycle." Since trimesters are incapable of definition with precision, Roe v. Wade, 410 U.S. 113, 163 (1973), this issue, and other similar issues, may be resolved later on a motion for summary judgment or at trial.

[10] The words "viable" or "viability" are referred to in sections 4, 5(1), 5(2), 5(3), 6(1), and 6(4) of the 1979 Law.

> lar facts of the case before him, there is a reasonable likelihood of more than momentary survival of the fetus outside the womb, with or without artificial support."

The critical words are "more than momentary". In *Colautti* the Supreme Court emphasized that viability does not mean "merely momentary survival", 99 S. Ct. at 681, and stated:

> "Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support." 99 S. Ct. at 682.

Thus, the Supreme Court has used the word "momentary" to explain what viability *does not mean* and has used the word "sustained" to explain what viability *does mean.* The court concludes that by using the words "more than momentary", instead of the word "sustained", section 2(2) is unconstitutionally vague and overbroad.

It must be underscored that under section 11(a) criminal penalties attach for intentional violations of any provision of the 1979 Law. A criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute or is so indefinite that it encourages arbitrary and erratic arrests and convictions is void for vagueness. *Grayned v. City of Rockford,* 408 U.S. 104, 108-09 (1972). The definition of viability suffers from both of these infirmities.

Furthermore, the phrase "more than momentary", taken literally, is overbroad because it describes fetuses that are incapable of "sustained survival", as that term is used in *Colautti,* as well as those that are capable of such survival. Thus, plaintiffs have established a reasonable likelihood that section 2(2) is unconstitutional.[11]

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[11] As a result, there is a reasonable likelihood that sections 4, 5(1), 5(2), 5(3), 6(1), and 6(4) are unconstitutional because they incorporate the words "viable" or "viability".

The definitions of "abortion" and "abortifacient" are not unconstitutional. The term "abortion" is defined in section 2(6) as

> "the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death."

This definition simply cures the vagueness problems found in the 1975 Act's definition of "criminal abortion". *Wynn v. Scott,* 449 F. Supp. at 1328-30, *aff'd sub nom. Wynn v. Carey,* 599 F.2d 193, 194-95 (7th Cir. 1979). The term "abortifacient" is defined in section 2(10) as

> "any instrument, medicine, drug, or any other substance or device which is known to cause fetal death when employed in the usual and customary use for which it is manufactured, whether or not the fetus is known to exist when such substance or device is employed."

The definition is not inconsistent with the definition of abortion, as contended by plaintiffs. Thus, plaintiffs have not established a reasonable likelihood that sections 2(6) and 2(10) are unconstitutional.[12]

Section 3.1(A) which is captioned "Medical Judgment" states that no "abortion shall be performed except by a physician after he determines that, in his best clinical judgment, the abortion is necessary". An identical provision was upheld in *Doe v. Bolton,* 410 U.S. 179, 191-92 (1973). There the Supreme Court expressly rejected plaintiffs' argument that such a provision is vague:

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[12] Since plaintiffs' challenge to section 11(d) is premised upon the unconstitutionality of the terms "abortifacient" and "abortion", plaintiffs have not established a reasonable likelihood that section 11(d) is constitutional.

> "Whether . . . 'an abortion is necessary' is a professional judgment that the . . . physician will be called upon to make routinely.
>
> . . . the medical judgment may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health. This allows the attending physician the room he needs to make his best medical judgment. And it is room that operates for the benefit, not the disadvantage, of the pregnant woman." 410 U.S. at 192.

Thus, plaintiffs have not established a reasonable likelihood that section 3.1(A) is unconstitutional.[13]

Section 3.2(A) of the 1979 Law prohibits performance of an abortion without "the voluntary and informed consent of the woman upon whom the abortion is to be performed." Parts (a) and (b) of subsection (1) of section 3.2(A) set forth a two-part test to determine when consent to an abortion is voluntary and informed. Part (a) states that:

> "The woman [must be] provided, at some time before the abortion, with a true copy of her pregnancy test

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[13] Plaintiffs do not strenuously challenge section 3.1(B)(1) which requires, *inter alia,* that before an abortion may be performed, the woman upon whom the abortion is to be performed must have a private medical consultation with the physician who is to perform the abortion. The terms "best clinical judgment" and "necessary", which are used in section 3.1(B)(1), are not vague for the reasons set forth above with respect to section 3.1(A).

Plaintiffs object to section 3.1(B)(2) which states that section 3.1(B)(1) shall not apply when there exists a medical emergency on the ground that "medical emergency" is not defined. What is or is not a medical emergency varies from case to case and this determination is a matter for the judgment of the responsible attending physician. *Cf. Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. 52, 64 (1976) (viability). Thus, plaintiffs have not established a reasonable likelihood that either part of section 3.1(B) is unconstitutional.

result by the physician who is to perform the abortion and the woman [must be] provided, at least 24 hours before the abortion, with the following information by the physician who is to perform the abortion:

(i) The name of the physician who will perform the abortion,

(ii) The particular medical risks associated with the particular abortion procedure to be employed,

(iii) The probable gestational age of the fetus at the time the abortion is to be performed, and

(iv) The printed information prescribed in Section 3.5 of this Law. . ..[14]

The right of privacy, which is not absolute, is subject to the state's interest in the health of its critizens. *Roe v. Wade,* 410 U.S. at 155. The legitimate state interest at stake in section 3.2 is protecting the woman by requiring an informed and voluntary consent to an abortion. As the Supreme Court stated in *Planned Parenthood of Central Missouri v. Danforth,* 428 U.S. at 67: "The decision to abort . . . is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences". The court believes that part (a) of the informed consent provision serves the state's interest. It does no more than give the woman information regarding what will be done and its consequences. As a result, it does not unduly burden the exercise of the woman's fundamental rights. Thus, plaintiffs have not established a reasonable likelihood that section 3.2(A)(1)(a) is unconstitutional.

Part (b) states that:

"Prior to submitting to the abortion, but subsequent to receiving the information prescribed by paragraph (A) (1) (a) of Section 3.2, the woman [must certify] in writing that she has received that information from the physician at least 24 hours before the abortion is to be

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[14] The constitutionality of section 3.5 is discussed later in the opinion.

> performed, that she understands it, that she consents to the abortion, and that her consent is voluntary and not the result of coercion."[15]

The state's interest in insuring that a woman's abortion decision is made after careful consideration of all of the facts applicable to her situation is furthered by the twenty-four hour waiting period requirement. From the record before the court, it cannot conclude that the twenty-four hour waiting period requirement unduly burdens the right to seek an abortion. *Bellotti v. Baird,* 99 S. Ct. 3035, 3046 (1979). Thus, plaintiffs have not established a reasonable likelihood that section 3.2(A)(1)(b) is unconstitutional.

Section 3.3 of the 1979 Law contains the parental consultation provision. According to subsection (A) of that section, an abortion may not

> "be performed upon a minor under the age of 18 years . . . unless at least 24 hours before the abortion the physician who is to perform the abortion or his agent informs each living parent or the guardian of the minor . . . that his or her daughter or ward is considering an abortion and provides each parent or the guardian with [certain] information. . .."

In *Bellotti v. Baird,* 99 S. Ct. 3035 (1979), the Supreme Court struck down a parental consent statute. In so doing the plurality opinion indicated what type of parental consultation statute would be upheld.

According to *Bellotti,* a state may reasonably determine that parental consultation often is desirable and in the best interest of the minor because minors often lack the ability to make fully informed choices that take into account both immediate and long-range consequences. However, because of

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[15] Except for the twenty-four hour waiting period, section 3.2(A)(1)(b) is virtually identical to the informed consent provision upheld in *Danforth.*

the unique nature of the abortion decision, especially when made by a minor, a state must act with particular sensitivity when it legislates to foster parental involvement in this matter. 99 S. Ct. at 3046-47.

In *Danforth,* the Supreme Court held that the unique nature and consequences of the abortion decision made it inappropriate "to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy". 428 U.S. at 74. As a result the plurality indicated in *Bellotti* that if a state decides to require prior parental notice or consultation, it must also provide for an alternative procedure whereby every minor will have the opportunity if she so desires to go directly to a court without first consulting or notifying her parents. 99 S. Ct. at 3048-50.

Section 3.3 does not provide for such an alternative procedure. The only exceptions to the parental notice requirement set forth in section 3.3(B) are for emancipated minors and medical emergencies. Thus, plaintiffs have established a reasonable likelihood that section 3.3 is unconstitutional.

In section 3.4(A) the 1979 Law provides that an abortion may not

> "be performed upon a married woman unless, at least 24 hours before the abortion, the physician who is to perform the abortion or his agent informs the spouse of the woman upon whom the abortion is to be performed that his wife is considering an abortion and provides him with [certain] information."

The only exceptions to section 3.4(A) set forth in section 3.4(B) are situations where the woman and her spouse are under a judgment of legal separation issued by a court of competent jurisdiction or where a medical emergency exists. In *Danforth* the Supreme Court recognized the legitimacy of a husband's interest in his wife's pregnancy, the state's interest in

protecting the marital relationship and the potential impact of an abortion decision on that relationship:

> We are not unaware of the deep and proper concern and interest that a devoted and protective husband has in his wife's pregnancy and in the growth and development of the fetus she is carrying. Neither has this Court failed to appreciate the importance of the marital relationship in our society . . . [and] recognize that the decision whether to undergo or to forego an abortion may have profound effects on the future of any marriage, effects that are both physical and mental, and possibly deleterious. 428 U.S. at 69-70.

However, statutes restricting abortions must be narrowly drawn to express only the legitimate state interests at stake. *Roe v. Wade,* 410 U.S. at 155. Section 3.4 is not narrowly drawn; indeed, it is overinclusive. It does not make an exception for couples who are estranged but not legally separated, for husbands who have deserted their wives prior to the pregnancy, or for husbands who are not responsible for the pregnancy. Thus, plaintiffs have established a reasonable likelihood that section 3.4 is unconstitutional.

Section 3.5 requires that the Department of Public Health publish printed materials designed to inform concerned persons of "public and private agencies and services available to assist a woman through pregnancy, upon childbirth and while the child is dependent" and "the probable anatomical and physiological characteristics of the fetus at the various gestational ages at which abortion might be performed".[16] For the same reasons that plaintiffs have not established a reasonable likelihood that section 3.2(A)(1)(a) is unconstitutional, they have not estab-

[16] Through incorporation by reference, section 3.2 requires the physician to give this printed material to the woman. It does not require him to read it to her and section 3.5(3) states that nothing in section 3.5 shall be construed to limit the right of the physician to express to the woman his own views concerning the materials prescribed by section 3.5.

lished a reasonable likelihood that the above-quoted parts of sections 3.5(1) and (2) are unconstitutional. However, this is not true with respect to the following paragraph which section 3.5(2) states must appear at the end of the printed materials:

> "The State of Illinois wants you to know that in its view the child you are carrying is a living human being whose life should be preserved. Illinois strongly encourages you not to have an abortion but to go through to childbirth. You are being given a list of agencies and services which can help you to continue the pregnancy, and assist you and your child after your child is born, whether you choose to keep your child or to place her or him for adoption. The State of Illinois strongly encourages you to contact some of them before making a final decision about abortion."

While the state has an important and legitimate interest in protecting the potentiality of human life, it also has an important and legitimate interest in protecting and preserving the health of the pregnant woman. These interests are separate and distinct. *Roe v. Wade,* 410 U.S. at 162. However, the state may not protect fetal life at the expense of the life or health of the mother. *Id.* at 163-64. As a result the paragraph is unconstitutionally underinclusive in that it fails to provide for those instances when the state may not promote the policy announced in the paragraph. Thus, plaintiffs have established a reasonable likelihood that the paragraph required under section 3.5(a) is unconstitutional.

Section 6(3) provides that

> "No person shall use or sell any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive. . . . Nothing in this Law shall prohibit the use or sale of any tissues or cells obtained from a dead fetus or dead premature infant whose death did not result from an induced abortion for use in

> therapeutic or scientific research, provided that written consent for such use or sale is obtained from one of the parents of such an infant or fetus. . . .

The first sentence of section 6(3) was upheld in *Wynn v. Scott*, 449 F. Supp. at 1322, and this court finds no reason to differ with Judge Marshall's conclusion. The second sentence in the above quotation was added by the 1979 Law. Since this sentence merely serves to provide an exception to the proscription of section 12, as will be discussed later in the opinion, there is no basis upon which these plaintiffs may attack its constitutionality. Thus, plaintiffs have not established a reasonable likelihood that section 6(3) is unconstitutional.

Essentially section 6(6) requires that the physician inform the woman of the existence of any known anesthetics or analgesics to abolish or alleviate organic pain to the fetus caused by the particular method of abortion to be employed.[17]

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[17] Section 6(6) states:

> "When there exists reasonable medical certainty that the particular method of abortion to be employed will cause organic pain to the fetus and there exists reasonable medical certainty that use of an anesthetic or analgesic which the physician knows to be available would abolish or alleviate organic pain to the fetus caused by the particular method of abortion to be employed, the physician who is to perform the abortion shall inform the woman upon whom the abortion is to be performed that such an anesthetic or analgesic is available for use to abolish or alleviate organic pain caused to the fetus by the particular method of abortion to be employed. Any person who performs an abortion with knowledge that any such reasonable medical certainty exists, or with reckless disregard as to whether any such reasonable medical certainty exists, and intentionally fails to so inform the woman commits a Class B misdemeanor. Paragraph (6) of Section 6 shall not apply when, in the medical judgment of the physician who is to perform the abortion based upon the particular facts of the case before him, there exists a medical emergency or the administration of such an anesthetic or analgesic would decrease a known possibility of more than momentary

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Section 6(6) is not unconstitutional because it asserts an interest in the fetus prior to viability. This section in many respects is analogous to the informed consent provision found in section 3.2(A). It does not restrict the decision of the woman and her physician regarding abortion. *Danforth,* 428 U.S. at 66. The state has an improtant and legitimate interest in the fetus prior to viability but the interest does not become compelling until viability, when the state may proscribe abortion except when it is necessary to preserve the life or health of the mother. *Roe v. Wade,* 410 U.S. at 162-64. Thus, plaintiffs have not established a reasonable likelihood that section 6(6) is unconstitutional.

Section 7 states in part:

> "In every case in which any infant is born alive as the result of a voluntary abortion, the physician who has performed the abortion shall notify the Juvenile Court that such an infant has been born. When such an infant has been born alive in a hosptial or licensed facility, the hosptial or facility shall also notify the Juvenile Court of the birth of the infant."

Plaintiffs have not challenged the constitutionality of this part of section 7 which requires physicians and hospitals to report such live births. Rather plaintiffs link their challenge of section 7 to their challenge of section 8. As discussed previously, plaintiffs do not have standing to challenge section 8. Since the remainder of section 7, the constitutionallity of which is challenged by plaintiffs, requires the Juvenile Court to take certain steps, not the physicians or their patients, plaintiffs lack stand-

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> survival of the fetus apart from the body of the mother, with or without artifical support. Paragraph (6) of Section 6 shall not apply when the physician who is to perform the abortion administers an anesthetic or an analgesic to the woman to abolish or alleviate pain caused to her by the particular method of abortion employed and he knows there exists reasonble medical certainty that such use will abolish organic pain caused to the fetus during the course of the abortion.

ing to challenge that part of section 7.[18] *See Danforth,* 428 U.S. at 62 n.2. Thus, plaintiffs have not established a reasonable likelihood that the first two sentences of section 7 are unconstitutional and plaintiffs do not have standing to challenge the constitutionality of the last two sentences of section 7.

Section 9 states

> "that the method or technique of abortion known as saline amniocentesis, whereby amniotic fluid is withdrawn and a saline solution if inserted into the amniotic sac for the purpose of causing fetal death and artifically inducing labor, is deleterious to material health and [therefore it] is . . . prohibited after the first trimester of pregnancy, unless it is the medical judgment of the physician who is to perform the abortion based on the particular facts of the case before him that in the interest of the woman's health saline amniocentesis should be employed in preference to any other method of abortion."

After the first trimester the state, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. *Roe v. Wade,* 410 U.S. at 164. The question then is whether section 9 is a restriction which reasonably relates to the preservation and protection of maternal health. *Danforth,* 428 U.S. at 76. The record establishes that the alternative method of prostaglandin installation is signficantly more dangerous than the saline technique. A regulation which bars a relatively safe procedure but permits a much more risky one is not

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[18] The remainder of section 7 states:

> "Upon notice of the birth of such an infant, the Juvenile Court shall initiate any proceeding and determinations which are appropriate under the provisions of Section 8 of this Law. During the course of such proceedings and determinations, the Juvenile Court shall not disclose the identity of the mother of any such infant except to the extent disclosure is necessary to secure the rights or interests of the infant, the infant's father, or the state."

reasonably related to maternal health. *Danforth*, 428 U.S. at 75-79; *Wynn v. Scott*, 449 F. Supp. at 1325. Thus, plaintiffs have established a reasonable likelihood that section 9 is unconstitutional.

Section 10 requires that reports of each abortion performed contain the following information:

> "(a) Identification of the physician who performed the abortion and the facility where the abortion was performed;
>
> (b) The political subdivision in which the patient resides:
>
> (c) Patient's date of birth, race and marital status;
>
> (d) Number of prior pregnancies;
>
> (e) Date of last menstrual period;
>
> (f) Type of abortion procedure performed;
>
> (g) Complications;
>
> (h) The date the abortion was performed;
>
> (i) Certification that the fetus was not viable or medical indications for any abortion performed when the fetus was viable;
>
> (j) Medical indications for the use of saline amniocentesis;
>
> (k) Medical indications for the nullification of any waiting period required under this Law;
>
> (l) Basis for any medical judgment that a medical emergency existed as required by Sections 3.1, 3.2, 3.3 or 3.4 of this Law;
>
> (m) The basis for the clinical judgment that an abortion is necessary; and
>
> (n) The date of the medical consultation required by paragraph (B) of 3.1, the time began and the time it ended:

Plaintiffs contend that these reporting requirements are unconstitutional because they are overly burdensome and because

they violate the fifth amendment rights of physicians performing abortions. Paragraphs (a) through (g) have already been upheld in *Wynn v. Scott,* 449 F. Supp. at 1326-27, *aff'd sub nom. Wynn v. Carey,* 599 F.2d at 194.[19]

In *Danforth* the Supreme Court upheld similar recordkeeping and reporting requirements on the grounds that they can be useful to the state's interest in protecting the health of its female citizens and that they may be a resource that is relevant to decisions involving medical experience and judgment. However, the Supreme Court cautioned that such requirements may not discourage abortions indirectly by imposing a sheer burden of recordkeeping detail. 428 U.S. at 81. Plaintiffs have not established that the addition of paragraphs (h) through (n) is unconstitutionally burdensome.[20]

Nor does section 10 violate the physician's privilege against compulsory self-incrimination. It is not directed to a "highly selective group inherently suspect of criminal activities" and it "is essentially regulatory, not criminal". *California v. Byers,* 402 U.S. 424, 430 (1971). A mere possibility of incrimination is insufficient. *Id.* at 428. Thus, plaintiffs have not established a reasonable likelihood that section 10 is unconstitutional.

Section 11(e) states:

> Any physician who diagnoses a woman as having complications resulting from an abortion shall report the patient's name, the diagnosis and a summary of her physical symptoms to the Department. If the physician making the diagnosis of a complication knows the identity

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[19] In *Wynn* the two sentences in section 10 which refer to and incorporate the Vital Records Act were held unconstitutional because the woman's right to privacy was not adequately protected. Extensive amendments to section 10 by the 1979 Law cure this defect.

[20] Since paragraphs (i), (j) and (l) refer to sections to [sic] the 1979 Law to which plaintiffs have established a reasonable likelihood of unconstitutionality, there is a reasonable likelihood that paragraphs (i), (j) and (l) are unconstitutional.

> of the physician who performed the abortion or the name or location of the facility where it was performed, he shall also report such information to the Department. Any physician who intentionally or knowingly violates paragraph (e) of Section 11 commits a Class C misdemeanor.

Section 11(e) is not unconstitutionally vague because the term "complication" is undefined. This word has a commonly accepted medical meaning and is substantially limited by the phrase "resulting from an abortion". Thus, plaintiffs have not established a reasonable likelihood that section 11(e) is unconstitutional.

Finally, plaintiffs challenge section 12 which states:

> The dead fetus and all tissue removed at the time of abortion shall be submitted for a gross and microscopic analysis and tissue report to a board eligible or certified pathologist as a matter of record in all cases. The results of the analysis and report shall be given to the physician who performed the abortion within 7 days of the abortion and such physician shall report any complications to his patient within 48 hours of receiving a report. There shall be no exploitation of or experimentation with the aborted fetus or tissue. Any evidence of live birth or of viability shall be reported immediately to the Department by the pathologist.

A very similar provision was before the three-judge district court in *Wynn v. Scott,* 449 F. Supp. at 1322. There the court held that section 12 was constitutional because there was a rational connection between section 12 and the state's interest in regulating social and health matters. With one exception, this court finds no reason to disagree with that conclusion. Despite the operation of the savings clause contained in section 6(3),[21] the third sentence of section 12 prohibits testing of

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[21] Section 6(3) provides, in pertinent part, that

"Nothing in this Law shall prohibit the use or sale of any tissues or cells obtained from a dead fetus or dead premature infant

(Footnote continued on following page)

fetuses whose death resulted from induced abortions for genetic complications to confirm physicians' *in utero* diagnoses. The statute thereby interferes with the privacy right in procreation, *Roe v. Wade,* 410 U.S. at 152; *Skinner v. Oklahoma,* 316 U.S. 535, 541-42 (1942), which includes family planning. Thus, plaintiffs have established a reasonable likelihood that the third sentence of section 12 is unconstitutional.[22]

With respect to the sections of the 1979 Law that plaintiffs have established at least a reasonable likelihood of success on the merits, they have also established that they have no adequate remedy at law and will be irreparably harmed if a preliminary injunction does not issue, that the threatened injury to plaintiffs outweighs the threatened harm a preliminary injunction may inflict on defendants, and that the issuance of a preliminary injunction will serve the public interest. *Ekanem v. Health & Hospital Corporation of Marion County,* 589 F.2d 316, 319 (7th Cir. 1978).

Accordingly, plaintiffs' motion for a preliminary injunction is granted with respect to section 2(2), section 3.3, section 3.4, the paragraph required under section 3.5(2), section 4, section 5(1), section 5(2), section 5(3), section 6(1), section 6(4), section 9, paragraphs (i), (j) and (l) of section 10 and the

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whose death did not result from an induced abortion for use in therapeutic or scientific research, provided that written consent for such use or sale is obtained from one of the parents of such an infant or fetus.

[22] The court notes that in *Wynn,* the three-judge district court upheld this sentence on the ground that it did not have the effect of discouraging abortions. That court was not faced with a challenge to this sentence based on its interference with the broader fundamental rights pertaining to procreation and family planning.

third sentence of section 12. Plaintiffs' motion for a preliminary injunction is denied with respect to all other sections of the 1979 Law.

It is so ordered.

JOEL M. FLAUM [s]
United States District Judge

Dated: November 16, 1979